Supreme Court, U.S.
FILED
APR 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1385

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

THE NATIONAL GRAIN & FEED ASSOCIATION, INC., AND UNITED TECHNOLOGIES CORPORATION,
Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF OF PETITIONERS, THE NATIONAL GRAIN & FEED ASSOCIATION, INC. AND UNITED TECHNOLOGIES CORPORATION

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Date: April 10, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF OF PETITIONERS, THE NATIONAL GRAIN & FEED ASSOCIATION, INC. AND UNITED TECHNOLOGIES CORPORATION

Petitioners, The National Grain & Feed Association, Inc. ("NGFA") and United Technologies Corporation ("UTC"), submit this brief in reply to the briefs of Respondents, the Occupational Safety and Health Administration ("OSHA") and United Steelworkers of America, AFL-CIO, CLC and Building and Construction Trades Department, AFL-CIO ("Union Respondents"), in opposition to Petitioners' Petition for a Writ of Certiorari in No. 88-1385.

I. THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION VIOLATED THE OCCUPATIONAL SAFETY AND HEALTH ACT AND ARTICLE I OF THE UNITED STATES CONSTITUTION BY IMPROPERLY DELEGATING ITS RULEMAKING AUTHORITY TO THE AMERICAN CONFERENCE OF GOVERNMENTAL INDUSTRIAL HYGIENISTS, INC.

Respondents attempt to minimize the need for this Court's review of OSHA's improper delegation of authority to the American Conference of Governmental Industrial Hygienists, Inc. ("ACGIH") by minimizing both the importance of this method of hazard determination and the effect that the delegation has on Petitioners. This attempt, however, is unpersuasive.

The delegation of rulemaking authority to ACGIH is neither a minor nor an innocuous part of the overall regulatory scheme. It is neither simply "a source of public information in the hazard determination process," OSHA Opposition at 25 n.19, nor is it merely "one of the mechanisms for triggering the applicability of substantive regulatory requirements *crafted by* OSHA." Union Respondents Opposition at 26 n.29. Therefore, Respondents' contention that Petitioners' Petition for a Writ of Certiorari should be denied because of the minor and

technical nature of the RHCS' adoption of the TLV Table is overly simplistic and simply wrong.

The determinations made by ACGIH directly correlate to those substances to be included in the TLV Table, and thus, the substances to be regulated by OSHA. Without doubt, the determination as to what substances are to be regulated by the RHCS is significant. Far from minor "matters of a more or less technical nature," OSHA Opposition at 25, such determinations represent the most basic and fundamental policy choices embodied in the Standard, and yet they are being made by a private organization.

Respondents do not deny that OSHA's delegation of its authority to ACGIH is final and complete. OSHA provides neither procedural safeguards nor technical standards to guide ACGIH's evaluation of chemicals for inclusion in its TLV Table. OSHA adopts ACGIH's determinations automatically and without Agency review.[1] Such delegation is all the more startling in light of OSHA's admission that ACGIH is not bound by the same procedural and substantive limitations that constrain the Agency in making its regulatory determinations, *e.g.*, opportunity for notice and comment, required findings of significant risk and economic and technological feasibility. *See* OSHA Opposition at 26 n.19.

In addition, Respondents simply ignore the fact that OSHA has not only adopted a private organization's conclusions without review, the Agency has delegated its authority to determine the scope of the RHCS to ACGIH

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[1] For this reason, Respondents cannot and do not deny that the rulemaking record is completely devoid of any material supporting ACGIH's determinations. As noted by Petitioners, neither the ACGIH TLV Table nor any supporting documentation was placed in the record. Pet. at 13 n.10. Thus, despite OSHA's protestations that ACGIH's inclusion of oat, wheat and barley dust on its TLV Table was based on 36 scientific studies and reports, OSHA Opposition at 22-23 n.14, no evidence of this exists in the rulemaking record, and clearly no evaluation of the reports' findings and methods was undertaken.

in perpetuity. When ACGIH establishes in the future a TLV for any substance, the substance will *automatically*, with no consideration by OSHA, become subject to the RHCS. There exists no procedure whatsoever by which OSHA will evaluate or review those changes. In fact, OSHA does not even have a mechanism by which it will receive notice of such changes.

The designation of grain dust as a hazardous chemical for the purposes of the RHCS highlights the power given by OSHA to ACGIH. In 1986, when ACGIH established a TLV for grain dust, grain dust automatically became subject to the RHCS.[2] This was far from being just a minor technical modification to the Standard. The action created new obligations for newly regulated entities, all without consideration or participation by OSHA or affected industries.

OSHA seeks to justify its violation of procedural safeguards by attesting to the alleged reputation and impartiality of ACGIH. OSHA Opposition at 22 n.13. Even if this attestation were accurate, which NGFA disputes, *see infra* at 5 n.3, such testimonials are of no relevance. The OSH Act prohibits OSHA from delegating its rulemaking authority to a private organization, regardless of the organization's reputation. OSHA at the very least was obligated to review and endorse the determinations of ACGIH. The Agency's failure to perform such a review is hardly remedied by a recitation of ACGIH's alleged impartiality.

OSHA does not refute Petitioners' assertion that ACGIH is not bound by the same procedural and substantive limitations that constrain the Agency. Instead, OSHA curiously attempts to analogize ACGIH's determination process to that used by chemical manufacturers and scientists upon whose studies such manufacturers must rely pursuant to 29 C.F.R. § 1910.1200(d)(2).

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[2] However, grain elevators were not regulated at that time because they are not manufacturers under Standard Industrial Classification ("SIC") Codes 20-39.

OSHA Opposition at 26 n.19. This analogy, however, is unpersuasive. Unlike determinations made by chemical manufacturers and scientists, whose findings and studies can be challenged by employers who are cited for violations under the RHCS, determinations of ACGIH are conclusive and cannot be challenged. For this reason, the absence in ACGIH's determinations of the procedural and substantive safeguards that Congress imposed on OSHA is fatal.

OSHA casually discounts Petitioners' constitutional arguments by contending that the delegation to ACGIH is permissible because government agencies may seek the assistance of private parties in " 'matters of a more or less technical nature.' " OSHA Opposition at 25 (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935)). However, this argument simply proves too much. Virtually every matter before OSHA is of a "technical nature," but notwithstanding its reliance on scientists "from Newton on down," Union Respondents Opposition at 25, the Agency could not, as a consequence, simply delegate all its rulemaking authority to private experts in various fields. It is the Agency itself which must provide the technical and scientific knowledge which Congress sought through its delegation of regulatory authority to OSHA. "Where Congress or the Executive vouchsafes part of its authority to an administrative agency, it is for the agency and the agency alone to exercise that authority." *See Population Institute v. McPherson*, 797 F.2d 1062, 1072 (D.C. Cir. 1986). Thus, the mere presence of technical issues in a proposed rulemaking is not a license for OSHA to completely remove itself from the actual decisionmaking process, as it has done with its delegation of authority to ACGIH.[3]

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[3] OSHA further attempts to support the constitutionality of its improper delegation of authority to ACGIH by analogizing such a delegation to OSHA's authorization in Section 6(a) of the OSH Act to adopt, without rulemaking, national consensus standards. OSHA Opposition at 25 n.18. However, such an analogy strains all logic and common sense. Section 6(a) authorized only the incorporation

OSHA's attempt to defend its improper delegation of authority to ACGIH on the ground that the Agency is not required to determine whether individual substances are hazardous for purposes of the RHCS is equally unavailing. OSHA Opposition at 20-21. As this Court has made clear, the Act requires a showing that a regulated substance represents a significant risk to employees. *See Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607, 653-64 (1980) (Plurality).[4] Common sense

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of a specific set of consensus standards, and not the wholesale adoption, in perpetuity, of the most recent findings of a particular private organization which concededly does not act by consensus. The latter situation, which exists in the instant case and permits the private entity to modify unilaterally Agency standards well into the future, is a far different category of delegation and one by which the Agency "crossed the line that demarcates constitutional delegations of rulemaking authority." OSHA Opposition at 24-25.

The difference between Section 6(a) national consensus standards and proprietary standards such as those adopted by ACGIH also discredits OSHA's contention. As the Agency admits, delegations of authority to private organizations are constitutionally deficient if the delegatee could exercise its authority "in a biased or self-aggrandizing manner." OSHA Opposition at 25. Thus, the importance of procedural fairness in a delegatee's exercise of its authority is of unquestioned relevance in determining the constitutionality of the delegation itself. The authority to adopt non-governmental standards without rulemaking pursuant to Section 6(a) was specifically tailored by Congress to apply to national consensus standards as opposed to proprietary standards for the very reason that the former standards satisfied the procedural fairness concerns of Congress. Pet. at 15-17. Thus, the decisions establishing the constitutionality of the adoption of standards under Section 6(a), which, by definition, are promulgated according to strict procedural requirements, are simply inapposite to the situation in the instant case. It is interesting to note that OSHA acknowledges that not only is ACGIH not bound by the same procedural requirements as is the Agency, OSHA Opposition at 26 n.19, its membership requirements effectively exclude industry representatives. OSHA Opposition at 22 n.13.

[4] OSHA cites this case for the proposition that the significant risk requirement is lessened when certain "information-gathering" requirements are involved, in an apparent attempt to provide support for the lower court's novel theory that the requirements of the

dictates that if a substance is not actually hazardous, then its treatment as hazardous by the RHCS will not reduce a significant risk in the workplace as required by the Act. For this reason, the RHCS contains an elaborate scheme for determining which substances are hazardous for purposes of the RHCS. OSHA Opposition at 21-24. Thus, the RHCS itself acknowledges the necessity of establishing a significant risk to employees as a result of exposure to substances that are covered by the RHCS. OSHA's claim, therefore, that it is not necessary to establish that individual substances represent a significant risk to employee health is contrary to the holding of this Court, common sense, and the RHCS itself.

The implicit basis for the Agency's position is that while hazard determinations are a crucial element of the RHCS, OSHA lacks the staff to make significant risk determinations for individual substances. OSHA Opposition at 14. Such a problem cannot, of course, excuse non-compliance with the statutory and constitutional parameters under which OSHA must operate. In any event, Petitioners do not contest the Agency's decision to put a " 'floor' under the hazard determination process." OSHA Opposition at 22. Rather, Petitioners challenge OSHA's decision to allow a private organization to determine that floor with no Agency oversight or review.[5] That OSHA

Act are not applicable to performance-oriented informational disclosure standards. OSHA Opposition at 15. However, the portion of the decision cited to refers only to medical testing of employees and has nothing to do with whether a specific substance represents a significant risk to employee health, a question at the core of the effectiveness of the RHCS. *See Industrial Union Dep't v. American Petroleum Institute*, 448 U.S. 607, 658 & n.66 (1980) (Plurality).

[5] Thus, the legislative directives recited by OSHA in its Opposition at 24 n.16, while laudable, are not relevant to the current inquiry. At issue are not the ends which the Agency strives to achieve, but rather the means which are employed to obtain such results. The Agency, both in delegating its authority to ACGIH and in responding to Petitioners' Petition for a Writ of Certiorari has ignored the statutory and constitutional parameters of its authority. Further, OSHA fails to show how compliance with these

has the resources to conduct such a review has recently been demonstrated in the new Standard for Air Contaminants published by the Agency on January 19, 1989, 54 Fed. Reg. 2329-2984 in which OSHA reviewed all the substances on the ACGIH TLV Table to determine whether each represented a significant risk to employee health.[6]

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parameters would prevent it from achieving the goals set forth in the Act.

[6] The Union Respondents argue that this new OSHA rule, in effect, moots the Petition for a Writ of Certiorari as to the delegation issue. Union Respondents Opposition at 24. This, however, is not the case. The rule on Air Contaminants is itself being challenged by well over 15 petitioners from numerous industries and may not withstand scrutiny. Moreover, other dusts not included in this new rule, such as soybean or corn dust, could in the future be added to the ACGIH TLV Table and become part of the RHCS. Furthermore, removal of dusts from Subpart Z will not affect the hazard determination process under the RHCS, as those substances will still remain on the ACGIH TLV Table.

Respondents also argue that oat, wheat and barley dust are physical hazards pursuant to 29 C.F.R. § 1910.1200(c), and are, therefore, covered by the RHCS regardless of whether the dusts are listed as a health hazard by ACGIH. Union Respondents Opposition at 25 n.28. However, even if this were correct (and the fact that the RHCS is a health rather than a safety standard belies this conclusion), Respondents ignore the fact that inclusion of these dusts in the RHCS as health hazards increases grain elevator operators' communication obligations. *See, e.g.*, 29 C.F.R. § 1200(g)(2)(vi) (inclusion of ACGIH TLV on the material safety data sheet as well as other information regarding alleged health effects); 29 C.F.R. § 1200(h)(1) (provision of information to employees regarding alleged health effects); 29 C.F.R. § 1200(h)(2) (provision of employee training regarding alleged health effects). Thus, incorporation into the RHCS of the ACGIH TLV Table as regards oat, wheat and barley dust has a significant impact on the obligations of grain elevator operators.

In addition, OSHA argues that regardless of the inclusion of oat, wheat and barley dust on the ACGIH TLV Table, the dusts would be covered under the RHCS because ACGIH's determination was based on 36 studies. OSHA apparently assumes, with no support, that these studies meet the requirements of the RHCS. It is not surprising that the Agency fails to identify the portion of the record which supports its conclusion since OSHA did not include either an ACGIH TLV Table or supporting studies in the record. Moreover, NGFA strongly disputes that these studies, which were

II. PETITIONERS WERE DEPRIVED OF THEIR STATUTORY RIGHT TO BE HEARD CONCERNING THE CONTENT OF THE REVISED HAZARD COMMUNICATION STANDARD.

As the Union Respondents make plain, the rulemaking at issue herein was completed by the time *USWA I* issued from the Court of Appeals. Union Respondents Opposition at 22. The RHCS is a significantly different and more expansive OSHA Standard from that which existed at the time *USWA I* issued. Not only did OSHA enlarge the scope of the Standard to include industries outside the manufacturing sector, but, as OSHA admitted, it substantively amended the Standard, purportedly to make it meaningful and in conformance with the particular needs of these additional industries.

The Court of Appeals characterized these changes in its *USWA III* decision as "logical outgrowth[s] of the rulemaking record." OSHA Opposition at 9 n.4. As OSHA makes clear to this Court and made clear to the Court of Appeals, the factual basis for the revised Standard was not extant in the original rulemaking record. Rather, OSHA began accumulating evidence subsequent to *USWA I*. This evidence was never submitted to rulemaking and, accordingly, Petitioners never had the opportunity to comment on this evidence. Moreover, Petitioners were deprived of the opportunity to comment on the admittedly substantive revisions which OSHA made to the Standard.[7]

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essentially devoted to wheat dust and the great majority of which have no relevance, would satisfy the requirements of the RHCS for determining whether a substance is hazardous. Obviously, this Court is not in a position to make such a determination. The proper forum to determine the issue would have been the OSHA rulemaking for the RHCS, but the Agency adopted the ACGIH TLV Table without reviewing the validity of ACGIH's conclusions.

[7] OSHA's attempt to minimize the importance of the substantive amendments by characterizing those changes as logical outgrowths of the original proceeding is also inconsistent with the position taken in its Petition for Certiorari of *USWA III*. Petitioners agree that the issues presented by that Petition are im-

Additionally, OSHA summarily dismisses other important consequences which the revised Standard will inflict on the public as if those consequences are of no moment. The original rulemaking, which the Union Respondents rightly characterize as completed by *USWA I*, did not include employers outside the manufacturing sector within the definition of those persons who bear the more weighty responsibilities under the Standard. As Respondents point out, those responsibilities include preparing material safety data sheets and labels, as well as overseeing the distribution of these materials to downstream consumers. OSHA goes so far as to suggest that NGFA could have anticipated that the Court of Appeals would expand the definition of chemical manufacturers to include persons not engaged in manufacturing and, therefore, that NGFA was aggrieved when the Standard was issued in its original form.[8]

Revisions to the Standard, such as the amended definition of "manufacturer," were not available for public debate. Respondents' arguments operate to deny the public its statutory and constitutional right to comment on substantive rules of conduct.[9]

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portant and that the Writ of Certiorari ought to issue. The information gathering requirements in the revised Standard for multi-employer worksites was of sufficient substance that the Director of the Office of Management and Budget ("OMB") saw fit to order OSHA not to implement the requirement. That provision appeared only in the revised Standard; there was no evidence in the original record to support the requirement.

[8] The fallacy of the argument is that grain and feed warehouses are not chemical manufacturers and were not chemical manufacturers when *USWA I* was decided by the Court of Appeals. They became "manufacturers" for purposes of the revised Standard when ACGIH included grain dusts on its TLV Table in 1986, and when OSHA expanded the definition of "manufacturer" in the amendments made to the Standard in 1987. There was no opportunity, nor any cause to suppose, that these widely disparate actions should have been anticipated by NGFA in 1983 when the litigation over the original Standard was instituted.

[9] The Union Respondents argue that the Court of Appeals correctly held that the existing record was adequate to make the

CONCLUSION

Accordingly, Petitioners' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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feasibility determination and precluded any further fact-gathering. That the Court of Appeals truncated OSHA's statutory obligation to allow public comment, apparently, does not disturb these Respondents. This position strains logic in light of the Union Respondents' argument regarding the Paperwork Reduction Act ("PRA") in which it suggests that:

> if the statement in OMB's decision disapproving the three provisions at issue here had been submitted as comments on a proposed rule, and if OSHA had rejected OMB's suggestions . . . OSHA's position could not be characterized as "unreasonable," and OMB would have had no right under the PRA to disapprove OSHA's decision.

Union Respondents Opposition in Nos. 88-1075 and 88-1434 at 12. Ironically, however, these comments were precluded by the Court of Appeals.

Another interpretation of the events giving rise to this dispute is, as the briefs in opposition of the Union Respondents and Public Citizen in Nos. 88-1075 and 88-1434 suggest, that OSHA took advantage of the order issued in *USWA II* to avoid its responsibilities under the rulemaking provisions of the Act and to frustrate the responsibilities of OMB under the PRA. The Court of Appeals in that decision gave OSHA 90 days to apply the 1983 Standard to non-manufacturers. The Agency used this time to create substantive amendments to the Standard and denied the public and OMB any opportunity to comment. Thus, OSHA created the paperwork compilation requirements which were the subject of the OMB order.